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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1318

VIOLA ROGERS, GUARDIAN, ET AL.,
Petitioners,

versus

RAY GARDNER FLYING SERVICE, INC., ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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VIOLA ROGERS, GUARDIAN, ET AL.,
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versus

RAY GARDNER FLYING SERVICE, INC., ET AL.,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this cause on November 16, 1970.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit and the Per Curiam opinion denying Petitioners' Petition for Rehearing and Petition for Rehearing En Banc are attached hereto in Appendix A.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on November 16, 1970.

A Petition for Rehearing and Petition for Rehearing En Banc was timely filed and denied on December 22, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether Title 49, U.S.C. § 1301 (26) preempts the Oklahoma law of bailments as it bears upon the liability of an owner-lessor of an airplane for the negligent acts of a non-agent operator-lessee.

STATUTES INVOLVED

This case involves the construction of Title 49, U.S.C., § 1301 (26), which provides:

"§1301. Definitions

As used in this chapter, unless the context otherwise requires —

• • • • •

(26) 'Operation of aircraft' or 'operate aircraft' means the use of aircraft, for the purpose of air navigation of aircraft. Any person who causes or authorizes the operation of aircraft, whether with or without the right of legal control (in the capacity of owner, lessee, or otherwise) of the aircraft, shall be deemed to be engaged in the operation of aircraft within the meaning of this chapter."

Title 49, U.S.C., § 1430 provides:

"(a) It shall be unlawful —

• • • •

(5) For any person to operate aircraft in air commerce in violation of any other rule, regulation, or certificate of the Administrator under this subchapter;".

STATEMENT OF THE CASE

This is a wrongful death action arising out of the crash of a private plane on January 2, 1957, near Ardmore, Oklahoma. Killed in the crash were Gordon Hunter, the pilot, Johnnie R. Hunter, his wife, and Ella Dunn, his sister-in-law. The plaintiffs-petitioners are Mr. and Mrs. Rogers who are the natural parents of Johnnie R. Hunter and Ella Dunn. Federal jurisdiction is based upon diversity of citizenship. Mr. and Mrs. Rogers sued individually and Mrs. Rogers asserted a separate claim as guardian of the minor children of Johnnie R. Hunter by a previous marriage.

The defendants below, respondents here, are Ray Gardner Flying Service, Inc., a fixed base operator in Wichita Falls, Texas, and Ray Gardner, the president of the corporation.

The plane involved in the crash was owned by Les Wilson and had been leased by Wilson to the corporate respondent, which in turn rented it to Hunter under an oral agreement.

The single thrust of this cause of action against respondents is that by operation of Title 49, U.S.C., § 1301 (26), the respondents are vicariously liable for the negligence of the pilot Hunter. This issue was raised before the district court by respondents' motion for summary judgment. The district court denied the motion, concluding:

> "The Oklahoma Constitution and statutes create a cause of action for wrongful death for recovery of damages from persons responsible for the wrongful death. It does not specify the persons who are responsible. The Federal Aviation Act (49 U.S.C. sec. 1301 (26)) provides that the owner or lessee is 'deemed to be engaged in the operation of the aircraft.' It is the obvious intent of Congress from this act and a later amendment 49 U.S.C. 1430 that the owner or lessee of an aircraft is responsible for the negligent operation of his aircraft.
>
> "Section 83(c) of the Oklahoma Aeronautic Commission Act in stating that one of its purposes is to assist in 'accomplishing the purposes of federal legislation' makes clear that Oklahoma has endorsed and by implication adopted the intent Congress expressed in enacting the Federal Aviation Act. In addition Oklahoma does not have any statute contrary to the provision of the Federal Aviation Act providing for the responsibility of the owner or lessee for the negligence of the pilot.

> "It is the conclusion of this Court that the Federal Aviation Act does not create a right or cause of action for wrongful death, but does provide the source for establishing owner and lessee responsibility for the negligence of the pilot, the cause of action being created by the Oklahoma wrongful death statute. [citing cases." (Emphasis added).

The district judge certified that her order overruling respondents' motion for summary judgment involved a controlling question of law and a panel of the Court of Appeals for the Fifth Circuit allowed an appeal under Title 28, U.S.C., § 1292 (b). The Fifth Circuit reversed and remanded the case with directions to enter summary judgment in favor of the respondents.

REASONS FOR GRANTING THE WRIT

By judicial fiat the Fifth Circuit has completely stripped the Federal Aviation Act of 1958 of one of its most important provisions. While recognizing that "under its commerce clause powers Congress could pre-empt state law with regard to the liability for injuries resulting from air crashes," the Court completely disregarded its own earlier interpretation of Section 1301(26) in *Hays v. Morgan*, 221 F.2d 481 (5th Cir., 1955), as well as *Sosa v. Young Flying Service*, 277 Fed. Supp. 554 (S.D. Texas, 1967); *Lamasters v. Snodgrass*, 248 Iowa 1377, 85 N.W.2d 622 (1957); *Hoebee v. Howe*, 98 N.H. 168, 97 A.2d 223 (1953) and *Ross v. Robert G. Apple, d/b/a Sheridan Airport*, 240 N.E.2d 825 (Ind. App., 1968). These cases all recognize that by enacting

the Federal Aviation Act, Congress pre-empted the field of air regulation and did in fact make provision for establishing responsibility for pilot negligence.

The Federal Aviation Act of 1958, 49 U.S.C.A. § 1301, et seq. and its predecessors is the most comprehensive legislation ever written concerning the safe control and efficient regulation of air commerce. As stated by Mr. Justice Jackson in *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292 (1944):

> "Congress has recognized the national responsibility for regulating air commerce. Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection in the hands of federally certified personnel and under an intricate system of federal commands. The moment a ship taxis onto a runway, it is caught up in an elaborate and detailed system of controls. It takes off only by instruction from the control tower, it travels on prescribed beams, it may be diverted from its intended landing, and it obeys signals and orders. Its privileges, rights, and protection, so far as transit is concerned, it owes to the Federal Government alone and not to any state government." 322 U.S. at p. 303.

In Kreindler, *Aviation Accident Law*, Vol. 1, § 10.01 [1], p. 321, the author states:

> "The Federal Aviation Act of 1958 is the most important source of law in the aviation law field. Its importance and effect, in many areas, cannot be exaggerated. It is the basic law of the land concerning aviation."

By its passage Congress created an independent agency, the Federal Aviation Agency, in which control was placed over all navigable air space in the United States for all civilian and military air traffic.

> "The Federal Aviation Act was passed by Congress for the purpose of centralizing in a single authority — indeed, in one administrator — the power to frame rules for the safe and efficient use of the nation's air space. . . ." *Airline Pilots Association International v. Quesada*, 276 F.2d 892, 894 (2nd Cir., 1960).

More important, under the provisions of this Act Congress has centralized in a single authority the power to promulgate rules and regulations regulating and prohibiting various types of conduct. These rules and regulations have the force and effect of law, *Maryland Casualty Co. v. U.S.*, 251 U.S. 342, 40 S. Ct. 155, 64 L.Ed. 297 (1920); *Hochrein v. U.S.*, 233 F.Supp. 317 (E. D. Pa., 1965), and when the operator of an aircraft violates these regulations, he is guilty of negligence as a matter of law: *San Diego Gas & Electric Co. v. U.S.*, 173 F.2d 92 (9th Cir., 1949); *Eastern Air Lines v. Union Trust Co.*, 221 F.2d 62 (D.C. Cir. 1955).

The congressional history of the Federal Aviation Acts clearly show that Congress intended to make the bailor of an aircraft responsible for the negligence operation of his aircraft. This is best illustrated by focusing attention on the original language of the Act and then considering the effect of a later amendment which specifically withdrew responsibility from a specified category of owners.

Section 1430 of 49 U.S.C.A. provides, in part:

> "(a) It shall be unlawful —
>
> • • •
>
> (5) For any person to operate aircraft in air commerce in violation of any other rule, regulation, or certificate of the Administrator under this subchapter;"

Section 1301(26) of 49 U.S.C.A. specifically defines "operation of aircraft" as follows:

> "'Operation of aircraft' or 'operate aircraft' means the use of aircraft, for the purpose of air navigation and includes the navigation of aircraft. *Any person who causes or authorizes the operation of aircraft, whether with or without the right of legal control (in the capacity of owner, lessee, or otherwise) of the aircraft, shall be deemed to be engaged in the operation of aircraft within the meaning of this chapter.*" (Emphasis added).

The above quoted provision was originally enacted in the Civil Aeronautics Act of 1938, 49 U.S.C.A. § 401(26).

In 1948, Congress amended the Act by adding Section 524 [now 49 U.S.C.A. § 1404], which provided in part, as follows:

> "No person having a security interest in, or security title to, any civil aircraft * * *, and no lessor of any such aircraft under a bona fide lease of thirty days or more, shall be liable * * *, for any injury to or death of person, * * *, unless such aircraft is in the actual possession or control of such person at the time of such injury, death, damage or loss."

Accordingly, although Congress expressly relieved security holders and certain lessors from liability if they were not in control of the operation of the aircraft, they left intact the financial responsibility and liability of others, even though they exercised no control over the operation of the aircraft. This intended result was made clear in the House Committee Report on the amendment which, as the reason for exempting security holders and certain lessors, stated:

> "Provisions of present Federal and State law might be construed to impose upon persons who are owners of aircraft for security purposes only, or who are lessors of aircraft, liability for damages caused by the operation

> of such aircraft even though they have no control over the operation of the aircraft. This bill would remove this doubt by providing clearly that such persons have no liability under such circumstances." *U.S. Congressional Code Service, 1948, 80th Congress, 2nd Session, p. 1836; House Report, No. 2091, 80th Congress, 2nd Session.*

In *Hays v. Morgan*, 221 F.2d 481 (5th Cir., 1955), the Fifth Circuit considered the effect of the 1948 amendment and concluded that Congress intended to relieve from liability only the security holders and lessors enumerated in Section 524. The court said:

> "But their [defendants] arrangements with these pilots does not bring them within the exemption of the act, *which shows a federal legislative intention to hold the owner liable as as operator*, and to relieve lienors and lessors only under conditions that are not present here." at p. 482. (Emphasis added).

The reference in the above quotation to the "act" refers to the Civil Aeronautics Act of 1938, 49 U.S.C.A. § 401 et seq. and specifically to § 401(26), the identical provision carried forward into the Federal Aviation Act of 1958 and at issue in our case.

Other cases have interpreted Section 1301(26) in the same manner.

In *Heebee v. Howe*, 97 A.2d 223 (New Hampshire Sup. Ct. 1953), suit was brought by a father for injuries to his minor son sustained when a low flying airplane scared a horse. The plane belonged to the defendant Skyhaven and had been rented to a student pilot. In holding the owner, Skyhaven responsible for the negligence of the pilot to whom it had rented its aircraft, even though contrary to its common law where no agency relationship existed, the court stated:

> "The first question which we shall consider is whether the Court's ruling is correct that certain state and federal statutes are a basis for liability of the defendant, Skyhaven, Inc. At the outset it should be noted that the effect of either the *federal* or state statute, if applicable at all, would be substantially the same applied to an intrastate flight such as was being made here. ..." at p. 225. (Emphasis added).

The court quoted a New Hampshire statute which codified verbatim the provisions of 49 U.S.C.A. § 1301 (26) and compared another provision from the state and federal acts, stating:

> "Both acts also contain substantially the same language relative to liability, that 'It shall be unlawful. ***, For any person to operate or authorize the operation of aircraft in violation of any other rule or regulation' issued under the authority of the act. C. 306, § 26, par. VII, Supra; ..."

The court further concluded:

> "• • • It seems to us from reading our act that the intent of our Legislature is clearly to place responsibility on the owner, even though he be without control, for the conduct of one to whom he entrusts the plane. The language is unequivocal and without qualification expressed or reasonably to be implied." 97 A.2d at p. 225.

After considering the congressional history of the Federal Act, the court held:

> "... Accordingly we hold the Trial Court correctly charged that casual violation of the state or *federal* statutes or any rules or regulations thereunder by the pilot of the plane would, in the absence of the plaintiff's contributory negligence, render the defendant Skyhaven liable." 97 A.2d at p. 226. (Emphasis added).

In *Lamasters v. Snodgrass*, 85 N.W.2d 622 (Iowa Sup. Ct., 1957), suit was brought against the owner of an aircraft for injuries to a passenger caused by the negligence of the pilot. There was no claim of an agency relationship between the pilot and the owner. The opinion in this case commences:

> "The sole question presented by this appeal is whether an owner who authorizes an-

other to fly his airplane is liable for the negligence of the pilot. * * *" 85 N.W.2d at p. 682.

After referring to a similar state statute, the court considered the provisions of the Federal Act as well as the amendment (49 U.S.C.A. Sec. 524) appearing in U. S. Code Congressional Service 1958, 85th Congress, Second Section, 1836. Citing *Hays v. Morgan*, 221 F.2d 481 (5th Cir., 1955) and *Hoebee v. Howe*, 97 A.2d 223 (New Hamp, Sup. Ct., 1953), the court then held that the obvious intent of the Federal Act was "to hold the owner liable as an operator." Referring to the Iowa statute which defined "operator" in substantially identical language to that used in 49 U.S.C.A. § 1301(26), the court said:

> "It therefore appears plaintiff's contention that by the language used in Section 328.1, subsection 14, the owner is, for liability purposes, identified with and treated as the operator, must be sustained. As the operator of an aircraft being operated in a careless or reckless manner and in violation of the care required in Section 328.41, he would be negligent per se and must be held liable to anyone damaged as a natural consequence of such conduct.
>
> "It is indeed hard to see any other reasonable interpretation of these laws. The words are clear, and while it may well be as contended by defendant that originally the legislature did not intend this chapter as one to

> give rise to an action for tort, or to extend the owner's personal liability beyond the common law provisions, by the recent amendments any doubt as to the import of the language is removed. * * *." 85 N.W.2d at p. 626.

In *Sosa v. Young Flying Service*, 277 F.Supp. 554 (S.D. Tex. 1968), the owner-defendant rented an aircraft to a student pilot, who crashed the plane killing all persons on board, including the plaintiff's decedents. The owner-defendant filed a motion to dismiss contending the Federal Aviation Act was not applicable. The trial court overruled the motion to dismiss on all points holding that the defendant was legally responsible for the negligence of the pilot to whom he had rented the aircraft, even in the absence of a respondeat superior relationship, citing *Hays v. Morgan*, 221 F.2d 481 (5th Cir., 1955), *Hoebee v. Howe*, 97 A.2d 223 (New Hampshire Sup. Ct., 1952) and *Lamasters v. Snodgrass*, 85 N.W.2d 622 (Iowa Sup. Ct., 1957).

In *Ross v. Robert G. Apple, d/b/a Sheridan Airport*, 240 N.E.2d 825 (Ind. App., 1968), the defendant leased a plane to a pilot who crashed while attempting a takeoff. The plaintiff, a passenger, was seriously injured and filed suit against the owner-defendant, alleging that the Federal Aviation Act of 1958 and the rules and regulations of the Federal Aviation Agency rendered the owner-defendant liable for the negligence of the pilot. The trial court sustained a general demurrer to the allegation against the owner-defendant. On appeal, the court reversed and remanded for trial

and quoting with approval *Hoobee v. Howe*, and citing *Lamasters v. Snodgrass*, and *Hays v. Morgan*, held, "• • • the amended complaint clearly state facts sufficient to raise this issue and the plaintiff-appellant should be given an opportunity to introduce his evidence on that point at trial."

In light of the congressional history of the Federal Aviation Acts and the above authorities, it is obvious that by enacting 49 U.S.C.A. § 1301(26) and its predecessors, Congress sought to protect the public from any negligence and financial irresponsibility of pilots by imposing vicarious liability upon one who allows his aircraft to be flown by another. One of the paramount reasons for the passage of the Federal Aviation Acts was to promote safety in aviation. The effect of 49 U.S.C.A. § 1301(26) is to promote greater safety in aviation by protecting the public from the hazards of aviation through imposition of liability upon one who authorizes another to operate his aircraft. By holding such persons responsible for the negligent conduct of those they allow to operate their aircraft, greater precautions will be taken in determining the pilot's qualifications, training, instructions, supervision and financial responsibility.

Public policy will best be served by placing the responsibility for the negligence of a financially irresponsible pilot upon one who causes or authorizes the use of his aircraft. This was recognized in 1955 by the Fifth Circuit in *Hays v. Morgan*, when the court said:

> "It is the evident intent of the statute to protect the public from any negligence and financial irresponsibility of pilots."

As matters now stand, most aircraft renters do not carry liability insurance covering the renter pilot, but carry insurance which only protects the value of the aircraft and the owner. In the absence of 49 U.S.C.A. § 1301(26) thousands of financially irresponsible pilots would be endangering the lives and property of the public each day. By strict application of § 1301(26), renters of aircraft will be forced to protect the public against financially irresponsible pilots by passing the cost of their insurance along to the renter pilot in the rental charge or by requiring that the renter pilot show evidence of financial responsibility. In 1965 there were 19,393 private pilots licensed in the United States. This was a 40% increase over a five year period beginning in 1960. A study conducted by the Federal Aviation Administration in 1966 revealed that in 1965, 50% of the 196,393 pilots rented aircraft.[1] The vital interest the Congress has in imposing financial responsibility on this vast number of renter pilots cannot be questioned.

The Fifth Circuit's opinion disregards these policy considerations and goes to great length to distinguish *Hays v. Morgan*, supra, *Lamasters v. Snodgrass*, supra, and *Hoobee v. Howe*, on the grounds that Mis-

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[1]Report No. FAA DS-66-15, "Study to Determine the Flight Profile and Mission of the Certificated Private Pilot," Department of Transportation, Federal Aviation administration, Aircraft Development Service, July, 1966.

sissippi, Iowa and New Hampshire had enacted a state statute identical to 49 U.S.C.A. § 1301(26). It seems axiomatic that if these identical state statutes intended to overturn the common law and make the bailor of an aircraft liable for the bailee's negligence, the *congressional* intent in enacting 49 U.S.C.A. § 1301 (26) must have been the same. If this was the intent of the state legislatures, certainly the congressional intent would not be different. Why would these states choose to clearly express their intent by enacting provisions taken from 49 U.S.C.A. § 1301(26) unless the same legislative intent was obvious from the congressional enactment? The Fifth Circuit's opinion does not answer these questions. Rather, under the guise of "federal-state comity" the court holds that Sec. 1301(26) was not intended to pre-empt state law.

Under the Fifth Circuit's holding there is no uniform application of regulations concerning air commerce. Federal control is not exclusive, but rather, is subject to the correlative interests of the state where an airplane crashes, for it is only in those states where legislation has been enacted patterned after the Federal Aviation Act that owners can be held responsible for the negligence of the pilot flying their aircraft. Such a result makes a mockery of Mr. Justice Jackson's statement in *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 299 (1944), when, in describing the authority by which aircraft use the airspace, he stated:

> ". . . Its privileges, rights, and protection, so far as transit is concerned, it owes to the fed-

eral government alone and not to any state government." 322 U.S. at p. 303.

Premises considered, petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this cause on November 16, 1970.

Respectfully submitted,

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PROOF OF SERVICE

I, Tom H. Davis, one of the attorneys for Petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 4th day of February, 1971, I served 2 copies of the foregoing Petition for Writ of Certiorari on Respondents by mailing the copies, in duly addressed envelopes, with postage prepaid, to their attorneys of record, Mr. Jack Pew, Jr., 4300 First National Bank Bldg., Dallas, Texas 75202.

Tom H. Davis

Tom H. Davis

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 28666

VIOLA ROGERS, GUARDIAN, ET AL.,
Plaintiffs-Appellees,

versus

RAY GARDNER FLYING SERVICE, INC., ET AL.,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Texas

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(November 16, 1970)

Before GODBOLD, SIMPSON and MORGAN, Circuit Judges.

SIMPSON, Circuit Judge: This appeal requires us once more to examine the amorphous subject of federal pre-emption. The precise question is whether Title 49, U.S.C., Section 1301(26)[1] preempts the Oklahoma

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[1] "§ 1301. Definitions
As used in this chapter, unless the context otherwise requires —

• • • •

(26) 'Operation of aircraft' or 'operate aircraft'

law of bailments as it bears upon the liability of an owner-lessor of an airplane for the negligent acts of a non-agent operator-lessee.

This is a wrongful death action arising out of the crash of a private plane on January 2, 1967, in Oklahoma. Federal jurisdiction is based on diversity of citizenship. Gordon Hunter, a citizen of Texas, was pilot of the plane. The other occupants were his wife, Johnnie R. Hunter, and her sister, Ella Dunn. All three were killed in the crash, which occurred near Ardmore, Oklahoma, on a return trip to Wichita Falls, Texas, from Arkansas. Hunter was a member of the United States Air Force stationed in and a resident of Wichita Falls. The plaintiffs-appellees, Mr. and Mrs. Rogers, are Arkansas citizens, the parents of Mrs. Hunter and Mrs. Dunn. Mr. and Mrs. Rogers sued individually and Mrs. Rogers asserted a separate claim as guardian of the minor children of Mrs. Hunter by a previous marriage.

The defendants below, appellants here, are Ray Gardner Flying Service, Incorporated, a fixed base operator in Wichita Falls, and Ray Gardner, the president of the corporation, individually. The plane was owned by Les Wilson[2] and had been leased by Wilson

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means the use of aircraft, for the purpose of air navigation and includes the navigation of aircraft. Any person who causes or authorizes the operation of aircraft, whether with or without the right of legal control (in the capacity of owner, lessee, or otherwise) of the aircraft, shall be deemed to be engaged in the operation of aircraft within the meaning of this chapter."

[2]Wilson was originally a defendant in this action but was subsequently dismissed from the suit.

to the corporate defendant, which in turn rented it to Hunter under oral agreement.

Appellees alleged that Hunter was negligent in the operation of the plane, and that such negligence was the proximate cause of the accident in which all occupants of the plane perished. They did not contend that the appellants exercised any control over the operation of the plane, that appellants were present in the plane, or that Hunter was their agent. Neither do they allege that the plane was negligently inspected or was rented while in a defective condition, or that the appellants were in any other manner negligent. The single thrust of the claim asserted against the appellants was that by operation of Title 49, U.S.C., §1301 (26) the defendants became vicariously liable for the negligence of the operator Hunter, and that this affords the basis for a wrongful death action under the law of Oklahoma.[3]

The controlling issue was raised before the district court by a defense motion for summary judgment. The district court denied the motion, holding that Title 49, U.S.C., §1301(26) "does not provide the source for establishing owner and lessee responsibility for the negligence of the pilot, the cause of action being created by the Oklahoma wrongful death statute". The district judge certified that her order involved a controlling

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[3]The parties are agreed that the Texas conflict of laws rule commands that the law of the place of the tort controls, and that the plaintiff's cause of action, if any, lies under the Oklahoma wrongful death statute. *Marmon v. Mustang Aviation, Incorporated*, 430 S.W.2d 182 (Tex. Sup. 1968).

question of law to which there was substantial ground for difference of opinion, and that appeal therefrom might materially advance the ultimate termination of the litigation. A panel of this Court allowed the appeal, under Title 28, U.S.C., Section 1292(b).

The Oklahoma wrongful death statute, 12 Okla. Stats. Ann. §1053,[4] provides that the defendant is liable only if the deceased might have maintained an action against the defendant for the same act or omission. However, Oklahoma decisions would not allow a cause of action against the defendants below. The Oklahoma Supreme Court has expressly held that the negligence of the bailee of an airplane may not be imputed to the bailor. *Spartan Aircraft Company v. Jamison*, 181 Okla. 645, 75 P.2d 1096 (1938). See also *Randall v. Schuth*, 185 Okla. 204, 90 P.2d 880 (1939).

Appellees apparently concede that no cause of action accrued to them under the Oklahoma law of bailments; they maintain, rather, that Title 49, U.S.C., §1301(26), forms the basis for a cause of action under the Oklahoma wrongful death statute. They point out

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4 "§ 1053. Death-Action for

"When the death of one is caused by the wrongful act or omission of another, the personal representative of the former may maintain an action therefor against the latter, or his personal representative if he is also deceased, if the former might have maintained an action had he lived, against the latter, or his representative, for an injury for the same act or omission. The action must be commenced within two years. The damages must inure to the exclusive benefit of the surviving spouse and children, if any, or next of kin; to be distributed in the same manner as personal property of the deceased."

that this section of the Federal Aviation Act of 1958[a] provides that anyone who authorizes the operation of aircraft in the capacity of an owner or lessee or otherwise is deemed to be engaged in the operation of aircraft as defined in the statute. Also, Title 49, U.S.C., §1430 provides:

> "(a) It shall be unlawful —
>
> • • • •
>
> (5) For any person to operate aircraft in air commerce in violation of any other rule, regulation, or certificate of the Administrator under this subchapter;".

An agency regulation states that "No person may operate an aircraft in a careless manner so as to endanger the life or property of another". 14 C.F.R. §91.9. The interweaving of these statutory sections and agency rules leads the appellees to the conclusion that if they can prove that the pilot was operating the airplane in a careless and negligent manner, then this declared unlawful conduct is imputed to the defendants by law under the provisions of Title 49, U.S.C., §1301 (26).

In 1948, the following section was added to the Act [now Title 49, U.S.C. §1404]:

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[a]Section 1301 was originally enacted in the Civil Aeronautics Act of 1938, and was retained in the Federal Aviation Act of 1958, which replaced the 1938 Act.

"No person having a security interest in, or security title to, any civil aircraft, aircraft engine, or propeller under a contract of conditional sale, equipment trust, chattel or corporate mortgage, or other instrument of similar nature, and no lessor of any such aircraft, aircraft engine, or propeller under a bona fide lease of thirty days or more, shall be liable by reason of such interest or title, or by reason of his interest as lessor or owner of the aircraft, aircraft engine, or propeller so leased, for any injury to or death of persons, or damage to or loss of property, on the surface of the earth (whether on land or water) caused by such aircraft, aircraft engine, or propeller, or by the ascent, descent, or flight of such aircraft, aircraft engine, or propeller or by the dropping or falling of an object therefrom, unless such aircraft, aircraft engine, or propeller is in the actual possession or control of such person at the time of such injury, death, damage, or loss."[6]

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[6]The House Committee Report on the amendment, as the reason for exempting security holders and certain lessors, stated:

"Provisions of present Federal and State law might be construed to impose upon persons who are owners of aircraft for security purposes only, or who are lessors of aircraft, liability for damages caused by the operation of such aircraft even though they have no control over the operation of the aircraft. This bill would remove this doubt by providing clearly that such persons have no liability under such circumstances." U.S. Congressional Code Service, 1948, 80th Congress, 2nd Session, p. 1836; House Report No. 2091, 80th Congress, 2nd Session.

The appellees rely on these statutes as evidence of their claim that Congress purposefully considered the question of pre-empting state laws on bailment of airplanes and concluded that only those persons exempted by Section 1404 should not be held liable as operators. They reason that Congress clearly intended to pre-empt state law and to protect the public from the negligence and financial irresponsibility of pilots by imposing vicarious liability upon one who allows his aircraft to be flown by another. Appellees argue that it is sound public policy to place the responsibility for negligence upon the parties in a position to control the use of airplanes and upon those who generally are more likely to be financially responsible.

Appellees contend that we have in fact endorsed their view of the applicable law in the case of *Hays v. Morgan*, 5 Cir. 1955, 221 F.2d 481. They also cite *Sosa v. Young Flying Service*, S.D. Tex. 1967, 227 F.Supp. 554; *Lamasters v. Snodgrass*, 248 Iowa 1377, 85 N.W.2d 622 (1957); *Hoebee v. Howe*, 98 N.H. 188, 97 A.2d 223 (1953), as supporting their position.

We do not question that under its commerce clause powers Congress could pre-empt state law with regard to the liability for injuries resulting from air crashes. But we are not convinced that in this instance Congress has clearly indicated any such intent to supersede state laws of bailments as related to the operation of air-

craft.[7] See *Double-Eagle Lubricants, Incorporated v. State of Texas*, N.D. Tex. 1965, 248 F.Supp. 515, appeal dismissed 384 U.S. 434, 86 S.Ct. 1601, 16 L.Ed.2d 670, and the cases cited therein. If Congress had any such intent toward pre-emption in this area it was fully capable of making that intent clear directly and not by indirection requiring the circuitous reasoning plaintiffs find themselves driven to employ. In our judgment, what Congress did intend was to subject the classes

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[7]Congressional intent or purpose to pre-empt state law may be shown in various manners. In *Rice v. Santa Fe Elevator Company*, 331 U.S. 218, 230, 67 S.Ct. 1146, ——, 91 L.Ed. 1447, —— (1947) it was said:

> "So we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress. *Napier v. Atlantic Coast Line R. Co.*, 272 U.S. 605, 611; *Allen-Bradley Local v. Wisconsin Employment Board*, 315 U.S. 740, 749. Such a purpose may be evidenced in several ways. The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. *Pennsylvania R. Co. v. Public Service Comm'n*, 250 U.S. 566, 569; *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148. Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. *Hines v. Davidowitz*, 312 U.S. 52. Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose. *Southern R. Co. v. Railroad Commission*, 236 U.S. 439; *Charleston & W. C. R. Co. v. Varnville Co.*, 237 U.S. 597; *New York Central R. Co. v. Winfield*, 244 U.S. 147; *Napier v. Atlantic Coast Line R. Co.*, supra. Or the state policy may produce a result inconsistent with the objective of the federal statute. *Hill v. Florida*, 325 U.S. 538."

Under neither of these tests are we persuaded that preemption was intended by Congress in the present situation.

of persons named in Title 49, Sec. 1301(26), equally with pilots to the rules, regulations, and penalties provided in the Federal Aviation Act. Several courts have in fact concluded that civil remedies for damages as a means of enforcing the act were not envisioned by Congress. *Yelinek v. Worley*, E.D. Va. 1968, 284 F.Supp. 670; *Mounger v. Brandt*, W.D. Wis. 1966, 250 F.Supp. 445; *Southeastern Aviation, Incorporated v. Hurd*, 209 Tenn. 630, 355 S.W.2d 436 (1962), appeal dismissed 371 U.S. 21, 83 S.Ct. 120, 9 L.Ed.2d 96 (1962).

We have been cited no case and we have found none from our independent research in which this precise subject has been before any of the Courts of Appeal. However, the issue was treated in depth by Chief Judge Arraj of the District of Colorado in *Rosdail v. Western Aviation, Incorporated*,* 1969, 297 F.Supp. 681. That court stated:

> "* * * We disagree, however, that Congress intended to alter common law principles with a definitional section of a regulatory scheme. The Federal Aviation Program regulates the licensing, inspection and registration of aircraft and airmen. It makes no provision for its application to tort liability and in fact provides that nothing in the Program shall abridge or alter the remedies now existing at common law or by statute. 49 U.S.C. §1506. Responsibility placed upon owners and lessors

*The *Rosdail* case is the subject of a student casenote at 48 Texas Law Review 488 (1970).

by §1301(26) arises merely in the context of violations of the Program and regulations promulgated pursuant thereunder. Furthermore, responsibility is in the nature of express civil and criminal penalties as provided for in §§1471, 1472 and 1474 of the Program." (297 F.Supp. 684-685).

We are in accord with the reasoning and result reached by *Rosdail*. Tort law has historically been left to the states. We reiterate our disbelief, in the absence of clearer evidence, that Congress would undertake to alter the tort laws of numbers of states in such oblique fashion.*

Appellees' reliance upon our earlier decision in *Hays*, supra, page 6, is a mistake. In *Hays* the State of Mississippi had expressly incorporated the language of the Federal Aviation Act into the law of that state, Code Miss. 1942, Sec. 7536-26(9) and 7536-12, and we were hence interpreting state law. It is one thing to say that the words of a state statute impose vicarious liability on the owners and lessors of an airplane. When those same words embodied in a federal statute are relied upon to widen state tort liability it is necessary

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*Although we have not independently researched the laws of all of the states with regard to the bailment of airplanes, counsel for the appellants allege that the adoption of appellees' preemption argument would alter the law of some eighteen states (Arizona, Georgia, Hawaii, Idaho, Maryland, Minnesota, Missouri, Nevada, New Jersey, North Carolina, North Dakota, Pennsylvania, South Carolina, South Dakota, Tennessee, Vermont, and Wisconsin) in addition to Oklahoma.

additionally to consider federal-state comity and the requirement that Congress clearly manifest an intention to exercise fully its power under the commerce clause.

The *Lamasters* and *Hoebee* cases, supra, were likewise cases where state laws patterned after the Federal Aviation Act were being interpreted. Only *Sosa*, supra, involved an interpretation of the Federal Aviation Act. That decision appears to us to be based upon the same incorrect reading of *Hays* successfully urged by appellees upon the court below.

We are not unsettled by the 1948 amendment, Title 49 U.S.C., §1404. That section excludes certain persons from liability for injuries *on the surface of the earth*. On its face it was enacted to facilitate financing of the purchase of aircraft by providing that those holding security interests would not be liable for injuries caused by falling planes or the parts thereof. This provision appears *clearly* and forthrightly to pre-empt any contrary state law which might subject holders of security interests to liability for injuries so incurred. If the Congressional intent was as clearly stated with regard to Title 49, U.S.C. §1301(26) our task would be correspondingly simpler. In the absence of similar clear manifestation of Congressional intent we find nothing in Title 49, U.S.C. §1404 which supports construction of Title 49, U.S.C., §1301(26) so as to pre-empt state law.

With leave of court the appellees have filed with the Court a post-submission brief in which it is urged that

the recent opinion of the Supreme Court of the United States in *Moragne v. State Marine Lines, Incorporated*, 398 U.S. 385, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970) bears upon this case. In *Moragne*, a longshoreman was killed while working aboard a vessel on navigable waters within the State of Florida. His widow brought an action against the owners of the vessel in a state court to recover damages for wrongful death and for the pain and suffering experienced by the decedent prior to his death. The claims were based upon unseaworthiness of the vessel and negligence. After removal of the case to the federal district court, the vessel owner moved for dismissal of the wrongful death claim on the grounds that maritime law provided no recovery for wrongful death within a state's territorial waters, and that the unseaworthiness was not a basis for liability under the Florida Wrongful Death Act. The district court dismissed the complaint and this Court affirmed after the Supreme Court of Florida answered our certified question[10] by holding that the Florida Death by Wrongful Act statute[11] does not allow recovery for wrongful death based upon unseaworthiness. The Supreme Court reversed, overruling *The Harrisburg*, 119 U.S. 199 (1886), and holding that a wrongful death action may be brought under general federal maritime law for violation of maritime duty even in the absence of a cause of action under state statute.

Appellees attempt to analogize this decision with the instant case by urging that they may now bring this wrongful death action for alleged breach of federally

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[10]Under F.S.A., Sec. 25.031, and Fla. Supreme Court Rule 4.61.
[11]F.S.A., Sec. 768.01 et seq.

declared aviation standards even in the absence of a cause of action under Oklahoma law.

Appellants' counter-argument quickly reaches the flaw in appellees' analogy to maritime law. The Constitution of the United States extends the judicial power of the federal courts to admiralty and maritime cases, and the federal courts have therefore been obliged to fashion a general maritime law in the absence of federal statute. Article III, Section 2, Clause 1; *American Insurance Company v. Canter*, 26 U.S. (1 Pet) 511, 545-6 (1828). State legislation which conflicts with general maritime law or federal statute is invalid. See Gilmore and Black, *The Law of Admiralty*, Sections 1-16, 1-17.

Conversely, the commerce clause as interpreted by the courts has left state sovereignty unimpaired except where Congress has clearly indicated an intent to supersede state law. *Rice v. Santa Fe Elevator Corporation*, supra, footnote 7, *Napier v. Atlantic Coast Line Railroad Company*, 272 U.S. 605, 47 S.Ct. 207, 71 L.Ed. 432 (1926); *Double-Eagle Lubricants*, supra. The difference is clearly expressed by appellants' reply to the supplemental brief:

> "Under this constitutional grant, the federal courts, except insofar as precluded by Congressional enactment or inhibited by stare decisis, are free to recognize and apply a judge-made cause of action for wrongful death in an admiralty case, as was done in *Moragne*. The Constitution, however, has not granted the fed-

eral courts any comparable power to fashion their own common law remedies in tort cases arising in the airways."

It becomes clear that the development of the power of the federal government under these two constitutional provisions has been strikingly dissimilar. A clear mandate has been recognized in the maritime area for the establishment of uniform federal law, whereas the delicate problem of federal-state relations has resulted in a more stringent rule that federal preemption under the commerce clause will not be presumed in the absence of a clear indication of the intent of Congress. The analogy to the *Moragne* holding fails to withstand analysis.

The judgment of the district court is REVERSED. The cause is REMANDED with directions to enter summary judgment in favor of the defendants-appellants.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 28666

VIOLA ROGERS, GUARDIAN, ET AL.,
Plaintiffs-Appellees,

versus

RAY GARDNER FLYING SERVICE, INC., ET AL.,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Texas

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion Nov. 16, 1970, 5 Cir., 1970, ___ F.2d ___).

(December 22, 1970)

Before GODBOLD, SIMPSON and MORGAN, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1969

No. 28666

D. C. Docket No. Civ. 7-398

VIOLA ROGERS, GUARDIAN, ET AL,
Plaintiffs-Appellees,
versus

RAY GARDNER FLYING SERVICE, INC., ET AL,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Texas

Before GODBOLD, SIMPSON and MORGAN,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court with directions to enter summary judgment in favor of the defendants-appellants.

It is further ordered that plaintiffs-appellees pay to defendants-appellants, the costs on appeal to be taxed by the Clerk of this Court.

November 16, 1970

Issued as Mandate: Dec. 30, 1970